FILE COPY

SEP 26 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1192

DONALD GOLDSTEIN, RUTH KOVEN and DONALD KOVEN,
Petitioners,

—against—

STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

BRIEF OF THE HARRY FOX AGENCY, INC., *AMICUS CURIAE*

JULIAN T. ABELES
ROBERT C. OSTERBERG
745 Fifth Avenue
New York, New York 10022
(212) 755-0812

JOHN S. CLARK
ABELES AND CLARK
Of Counsel

INDEX

PAGE

The Interest of The Harry Fox Agency, Inc., Amicus Curiae 1

Argument 5

Conclusion 6

Table of Authorities

Cases

Duchess Music Corp. v. Stern, 458 F.2d 1305 (9 Cir. 1972), rehear'g. den'd. April 26, 1972 .....4, fn 8

Reeve Music Co. v. Crest Records, Inc., 285 F.2d 546 (2 Cir. 1959) .....4, fn 8

Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399 (S.D.N.Y. 1966) ..4, fn 8, 10

327 F. Supp. 788 (S.D.N.Y. 1971), mod'd. 453 F.2d 552 (2 Cir. 1972) .....4, fn 8

Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260 (2 Cir. 1957) cert. den. 355 U.S. 952 (1958) .....4, fn 8

Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304 (2 Cir. 1963) .....4, fn 8

Shapiro, Bernstein & Co. v. Remington Records, Inc., 265 F.2d 263 (2 Cir. 1959) .....4, fn 8

Legislation

Copyright Law, 17 U.S.C.

§1 (e) .....2, fn 3, 5

§101 (e) .....2, fn 3

Other Authorities

PAGE

Hearings on S.646 and H.R. 6927, prohibiting Piracy of Sound Recordings, before Subcommittee No. 3 of The House Committee on The Judiciary, 92nd Cong., 1st Sess. ..... 4, fn 9, 10

Knight, The Mechanical Royalty Rate on Sound Recordings: Survey of Issues Before The Judiciary Committees of The Congress, Library of Congress Legislative Reference Service ..... 3, fn 4-6

Marketing—The $100-Million Market in Bootleg Tapes, Business Week, May 15, 1971 ..... 3, fn 7

Shemel and Krasilovsky, This Business of Music, rev. ed. 1971 ..... 2, fn 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1192

DONALD GOLDSTEIN, RUTH KOVEN and DONALD KOVEN,
Petitioners,

—against—

STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

BRIEF OF THE HARRY FOX AGENCY, INC., *AMICUS CURIAE*

A. The Interest of The Harry Fox Agency, Inc., *Amicus Curiae*

The Harry Fox Agency, Inc. (hereinafter referred to as the "Agency") is one of the major service agencies in the United States music industry. It represents more than three thousand five hundred music publishers in the licensing and enforcing of the rights of mechanical reproduction in their respective copyrighted musical works.[1]

[1] A listing of the music publisher principals of the Agency supplemented to May, 1972, entitled "The Harry Fox Agency, Inc.—Directory of Music Publishers" is being separately filed herewith as "Amicus Exhibit A". The right of mechanical reproduction is one of the separate rights in a musical work protected under the Copyright Law, 17 U.S.C.

Generally, the authors of a musical work assign the copyright therein to a music publisher pursuant to an agreement which requires payment to the authors of specified royalties computed from the amount earned by the exploitation of the work. The almost uniform royalty payment to authors for mechanical uses of their copyrighted musical works is fifty percent of the monies received by the publishers.[2] For each unauthorized recording manufactured, the authors of the musical works reproduced thereby, as well as the music publishers, are deprived of income. Unauthorized recordings have become known in the trade as "pirated" or "bootleg" recordings.

The Agency operates pursuant to the separate instructions of each of its music publisher principals in the issuance of agreements to more than 1,500 legitimate phonograph record and tape recording manufacturers in the United States, for their uses of its principals' respective copyrighted musical works in the manufacture of recordings for commercial distribution. During the past calendar year, more than 60,000 such agreements were issued by the Agency. In addition, the Agency issues agreements on behalf of its principals for the uses of their respective copyrighted musical works in the manufacture of recordings for purposes of public performance for profit, by means of radio, television, motion pictures and background music systems.[3] Royalty payments for the uses of its principals'

---

[2] Shemel and Krasilovsky, This Business of Music, rev. ed., 1971, at pp. 126, 127, 179.

[3] Section 1 (e) of The Copyright Law (17 U.S.C. § 1 (e)) treats differently the right to make recordings of copyrighted musical works for purposes of public performance for profit from the right to manufacture recordings for commercial distribution. The former is set forth in the main portion of Section 1 (e), and is the exclusive right of the copyright proprietor. The latter is set forth in the proviso to Section 1 (e), and is exclusive only until the copyright proprietor has

(*footnote continued on following page*)

copyrighted musical works are collected by the Agency, which deducts a commission and distributes the remainder to its appropriate principals. The Agency retains certified public accountants who periodically audit the books and records of the legitimate manufacturers to verify the accuracy of their royalty reports and payments.

Income from mechanical uses is one of the two major sources of income earned by a musical work.[4] In 1968, total mechanical royalties collected by music publishers in the United States amounted to approximately $44.8 Million.[5] Currently, it is closer to $80 Million. The Agency collects approximately sixty percent of all mechanical royalties collected in the United States.[6] The Agency estimates that music publishers and authors are being deprived of more than $10 million annual income by the manufacturers of pirated recordings.[7]

(*footnote continued from preceding page*)

"used or permitted or knowingly acquiesced" in the manufacture of a recording for commercial distribution (the terminology of the proviso is "use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work"). Thereafter, the copyrighted musical work becomes subject to a statutory compulsory license for the manufacture of other recordings for commercial distribution, detailed in the proviso to Section 1 (e) and in Section 101 (e). The copyrighted musical work then may be used by any manufacturer of recordings for commercial distribution who utilizes his own recording artists, musicians and technicians to make a new recording of the copyrighted musical work, and otherwise complies with the compulsory license provisions.

[4] Knight, The Mechanical Royalty Rate on Sound Recordings: Survey of Issue Before the Judiciary Committee of the Congress, Library of Congress Legislative Reference Service, June 30, 1969, at p. 21.

[5] Id. at 23.

[6] See ibid.

[7] Marketing—The $100-Million Market in Bootleg Tapes, Business Week, May 15, 1971.

For many years, The Agency has supervised a vigorous copyright enforcement program on behalf of its principals against manufacturers and sellers of pirated recordings.[8] The profits derived from pirated recordings are so great, and the investment capital requirement so small,[9] that new pirates constantly appear. They seek a quick fortune at the expense of virtually all legitimate members of the music industry and employ all devious means to avoid detection.[10] As a result, the Agency has actively supported state legislation making it a crime to engage in the manufacture and exploitation of pirated recordings. Such legislation has proven to be of substantial benefit to all legitimate members of the music industry, and a necessary weapon in the fight for their economic survival.

---

[8] Some illustrative reported court decisions are: Shapiro Bernstein & Co. v. Goody, 248 F.2d 260 (2 Cir. 1957), cert. den. 355 U.S. 952 (1958); Shapiro, Bernstein & Co. v. Remington Records, Inc., 265 F.2d 263 (2 Cir. 1959); Reeve Music Co. v. Crest Records, Inc., 285 F.2d 546 (2 Cir. 1960); Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2 Cir. 1963); Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc. 256 F.Supp. 399 (S.D.N.Y. 1966), and 327 F. Supp. 788 (S.D.N.Y. 1971), mod'd. 453 F.2d 552 (2 Cir. 1972); and Duchess Music Corp. v. Stern, 458 F.2d 1305 (9 Cir. 1972), rehear'g. den'd. April 26, 1972.

[9] Statement of Albert Berman, managing director of The Harry Fox Agency, Inc. Hearings on S.646 and H.R. 6927 Prohibiting Piracy of Sound Recordings, before Subcommittee No. 3 of the House Committee on The Judiciary, 92d Cong., 1st Sess. Ser. 7, at 58 (1971) (Hereinafter referred to as "Piracy Hearings").

[10] See: Screen-Gems-Columbia Music Inc. v. Mark-Fi Records, Inc., 256 F.Supp. 399 (S.D.N.Y. 1966); Statement of Robert C. Osterberg on Behalf of The Harry Fox Agency, Inc., Piracy Hearings, Ser. 7 at 64 (1971).

Argument

The Agency endorses the legal arguments and conclusions presented in the Brief of Respondent and the Brief of Recording Industry Association of America, Inc., appearing as amicus curiae herein. Both briefs have been thoroughly reviewed and considered by the Agency's counsel. It is respectfully submitted that they contain a highly skilled and persuasive discussion of all pertinent legal principles.

If recordings may be lawfully duplicated as soon as they are released for commercial distribution, the destruction of the value of the rights of mechanical reproduction in copyrighted musical works inevitably will follow. Virtually no intelligent business enterprise would thereafter consider making the large capital investment required to produce an original recording.[11] The obvious incentive would be to duplicate rather than originate. Even if a duplicator should pay royalties to the music publisher, the lack of incentive to make original recordings will seriously impair the value of the publisher's exclusive right to license the first recording of the copyrighted musical work (17 U.S.C. §1 (e)). Furthermore, multiple recordings of a musical work increase its potential value. For example, people who do not purchase a recording of a musical work by Elvis Presley, may purchase a recording of the same musical work by the Beatles, or other artists. The history of the music business is replete with examples of new recordings exceeding the popularity of earlier recordings by other artists. The public welfare is not advanced by duplicators of another's recordings. The duplicates do not increase the selection of music offered to the public. Only original recordings serve that function.

---

[11] The high cost of making original recordings is fully discussed at pp. 8, 9 in The Brief of Recording Industry Association of America, Inc., Amicus Curiae herein.

CONCLUSION

It is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

JULIAN T. ABELES
ROBERT C. OSTERBERG
745 Fifth Avenue
New York, New York 10022
(212) 755-0812

JOHN S. CLARK
ABELES AND CLARK
Of Counsel